MBf Property Services Sdn Bhd & Anor v Balasubramaniam a/l K Arumugam

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-714 OF 1997

GOPAL SRI RAM, NH CHAN AND AHMAD FAIRUZ JJCA

25 JANUARY 2000

Contract *— Construction of terms of contract — Payment of interest — Loan taken to purchase property — Letter of offer reserves bank's right to effect commencement of monthly instalment of principal and interest — Agent of developer guarantees payment of interest accrued on loan until issue of certificate of fitness — Whether borrower needs to make payment to bank before issue of certificate of fitness — Meaning of certificate of fitness — Whether all agreements must be read together as forming part of same transaction*

The respondent obtained a loan from the second appellant for the purchase of a property ('the unit') from a developer. Contemporaneously with the signing of the sale and purchase agreement, the first appellant — an attorney for the developer — in an undated letter, agreed to pay all interest accrued on the respondent's loan disbursed to pay for the purchase price of the unit during the period of construction of the unit and until the loan is fully drawdown with the certificate of fitness being issued. Clause 8 of the second appellant's letter of offer provides that the second appellant reserve the right to effect the commencement of the monthly instalment of principal and interest at its absolute discretion from time to time. The respondent sought a declaration against the appellants that he need not make any payments to the second appellant until the issuance of the certificate of fitness for occupation. The learned judge allowed the application. On appeal, the appellants, submitted that the learned judge erred by failing to take account of cl 8 of the second appellant's letter of offer. He argued that on a proper construction of the terms of the letter, the second appellant reserved the right to call upon the respondent to commence repayment of the loan without taking into account the issuance of the certificate of fitness for occupation.

Held, dismissing the appeal:

(1) The three documents; the sale and purchase agreement, the agreement with the first appellant and the loan agreement with the second appellant, must be read together as they form part of the same transaction (see p 270F–G); *Manks v Whitely* [1912] 1 Ch 735 followed. When the three documents are read as a whole, their effect is this. Firstly, upon the purchase of the property by the respondent, the first appellant shall keep the respondent indemnified in respect of any monetary payments due to the second appellant until the certificate of fitness of occupation is issued. Secondly, the second appellant will lend money to the respondent to pay for the purchase upon the mutual covenants contained in its letter of offer subject to the condition

that the interest will be paid by the first appellant during the relevant period (see p 271A–C). A

(2) It may be presumed that the parties used the term 'certificate of fitness' as employed the Building (Federal Territory of Kuala Lumpur) By-Laws 1985 (which defines 'certificate of fitness' as a certificate which would entitle the respondent to occupy the unit). No fault, therefore, may be placed upon the reasoning adopted by the learned judge (see p 271D–E). B

[Bahasa Malaysia summary

Responden telah memperolehi suatu pinjaman daripada perayu kedua untuk pembelian harta tanah ('unit tersebut') daripada pemaju. Pada masa yang sama dengan penandatanganan perjanjian jual beli, perayu pertama — seorang wakil untuk pemaju — di dalam surat yang tidak bertarikh, bersetuju untuk membayar semua faedah yang terakru di atas pinjaman responden bagi membayar harga belian unit tersebut semasa tempoh pembinaan unit tersebut dan sehingga pinjaman tersebut adalah dikurangkan sepenuhnya dengan sijil suai duduk dikeluarkan. Fasal 8 surat tawaran perayu yang kedua memperuntukkan bahawa perayu kedua masih mempunyai hak untuk mengenakan ansuran bulanan prinsipal dan faedah di atas budi bicara mutlaknya dari masa ke masa. Responden telah memohon suatu deklarasi terhadap perayu-perayu bahawa beliau tidak perlu membuat pembayaran kepada perayu kedua sehingga pengeluaran sijil suai duduk. Hakim yang arif telah membenarkan permohonan tersebut. Semasa rayuan, perayu-perayu menghujahkan bahawa hakim yang arif telah silap kerana gagal mengambil kira fasal 8 surat tawaran perayu yang kedua. Beliau berhujah bahawa di atas penafsiran yang sebenar terma-terma surat tersebut, perayu kedua berhak untuk memanggil responden untuk mulakan pembayaran semula pinjaman tanpa perlu mengambil kira pengeluaran sijil suai duduk. C D E F

Diputuskan, menolak rayuan: G

(1) Ketiga-tiga dokumen; perjanjian jual beli, perjanjian dengan perayu pertama dan perjanjian pinjaman dengan perayu kedua, mestilah dibaca bersama oleh kerana ia membentuk sebahagian daripada transaksi yang sama (lihat ms 270F–G); *Manks v Whitely* [1912] 1 Ch 735 diikut. Apabila ketiga-tiga dokumen dibaca secara menyeluruh, kesannya adalah seperti berikut. Pertama, selepas pembelian harta tanah oleh responden, perayu pertama akan menanggung rugi berkenaan dengan pembayaran wang yang terhutang kepada perayu kedua sehingga sijil suai duduk dikeluarkan. Kedua, perayu kedua akan meminjam wang kepada responden untuk membayar bagi pembelian tersebut berdasarkan perjanjian bersama yang terkandung di dalam surat tawarannya tertakluk kepada syarat bahawa faedah akan dibayar oleh perayu pertama semasa tempoh yang berkaitan (lihat ms 271A–C). H I

A (2) Boleh dianggapkan bahawa pihak-pihak tersebut mengunakan terma 'sijil suai duduk' seperti yang digunakan oleh Peraturan Kecil (Wilayah Persekutuan Kuala Lumpur) Bangunan 1985 (yang mendefinasikan 'sijil suai duduk" sebagai suatu sijil yang memberi hak kepada responden untuk menduduki unit tersebut). Tiada kepenyalahan, oleh itu, boleh diletakkan atas pertimbangan
B yang diterima oleh hakim yang arif (lihat ms 271D–E).]

Notes

For cases on construction of terms of contract generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1883–1942.
C

Kelvin Kong (*Heng & Mogan*) for the appellants.
V Rajadevan (*Joseph Mathews* with him) (*Rajadevan & Associates*) for the respondent.

Gopal Sri Ram JCA (delivering oral judgment of the court): This appeal
D concerns the construction of an agreement entered into between the first appellant and the respondent. Briefly, the background against which this appeal rests is as follows.

On 23 July 1993, the respondent entered into a sale and purchase agreement with a housing developer called Kesturi Sakti Sdn Bhd to
E purchase a property. It was an agreement in the statutory form prescribed by the Housing Developers (Control and Licensing) Regulations 1989.

In order to finance the purchase of the property under the sale and purchase agreement, the respondent applied for and obtained a loan from the second appellant. In its letter of offer of a housing loan dated 25 August 1993, the second appellant inserted a provision which reads as follows:

F

> Clause 8
>
> Repayment
>
> Interest on the loan shall be payable monthly until the issuance of Certificate of Fitness (CF). Upon the issuance of CF, repayment of this loan will be by 132 equal monthly instalments of principal and interest of Malaysian Ringgit
G RM2,628.76, the first instalment to be made on the first day each month following next after the date of issuance of Certificate of Fitness (CF). However, MBf Bhd reserve the right to effect the commencement of the monthly instalment of principal and interest at our absolute discretion from time to time.

H This offer was accepted by the respondent on 2 September 1993. Contemporaneously with the signing of the sale and purchase agreement, the first appellant and the respondent entered into an agreement which is evidenced in an undated letter of the first appellant. Shorn of its formal parts, this is what it says:

I

> We refer to your purchase of the above unit.
>
> We are pleased to inform you that in consideration of you purchasing the said unit, we agree to pay all the interest accrued on your loan disbursed to pay for the purchase price of the above unit during the period of construction

> of the unit and until your loan is fully drawdown with the certificate of fitness being issued. The agreement to pay is not assignable by you and subject to you complying with the terms and conditions of your loan agreement with your end financier.
>
> The payment of the interest will be made by us directly to your end financier with whom we shall be making arrangement to pay with your consent. Your end financier will keep you informed of the payment.
>
> Please note that our agreement to pay interest is also subject to that the interest rate from your end financier for the loan must not be more than the prevailing rate of interest imposed by MBf Finance Bhd for this type of unit. If the interest rate of your loan is higher than the rate of MBf Finance Bhd, you will have to bear the difference of any excess.
>
> Kindly signify your acceptance of our agreement to pay the interest and your consent to communication with your end financier.

This document is signed by the first appellant as the attorney for Kesturi Sakti Sdn Bhd. It shows as having been copied to 'End Financier' who in the present instance, counsel for the appellants concedes, is the second appellant.

Later, on 29 April 1997, the respondent took out an originating summons against the appellants, asking for a declaration that he need not make any payments to the second appellant until the issuance of the certificate of fitness for occupation. The learned judge granted an order in terms of that application.

Before us, Mr Kelvin Kong for the appellants, submitted that the learned judge erred by failing to take account of cl 8 of the second appellant's letter of offer. He argued that on a proper construction of the terms of the said letter, which was issued by the second appellant and accepted by the respondent, the second appellant reserved the right to call upon the respondent to commence repayment of the loan without taking into account the issuance of the certificate of fitness for occupation.

With respect, we cannot accept this submission. The three documents; the sale and purchase agreement, the agreement with the first appellant and the loan agreement with the second appellant, must be read together as they form part of the same transaction. This is in accordance with settled principles of law.

Thus, in *Manks v Whitely* [1912] 1 Ch 735, Fletcher Moulton LJ said (at p 754):

> [W]here several deeds form part of one transaction and are contemporaneously executed, they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties, they must be equities arising out of the transaction as a whole. It is not open to third parties to treat each one of them as a deed representing a separate and independent transaction for the purpose of claiming rights which would only accrue to them if the transaction represented by the selected deed was operative separately. *In other words, the principles of equity deal with the substance of things, which in such a case is the whole transaction, and not with*

A *unrealities such as the hypothetical operation of one of the deeds by itself without the others.* (Emphasis added.)

When the three documents are read as a whole, their effect is this. In the first place, the respondent shall purchase the property from the developer at a specified price and terms provided under the sale and purchase
B agreement. Thereafter, the first appellant shall keep the respondent indemnified and harmless in respect of any monetary payments due to the second appellant until the certificate of fitness of occupation is issued. Secondly, the second appellant will lend money to the respondent to pay for the purchase upon the mutual covenants contained in its letter of offer subject to the condition that the interest will be paid by the first appellant
C during the relevant period.

Now it is quite clear that the undated letter of the first appellant provides no definition of the expression 'certificate of fitness'. It merely uses that term. The learned judge relied on the Building (Federal Territory of Kuala Lumpur) By-Laws 1985 as an aid to interpret the meaning of that
D phrase. 'Certificate of fitness' under the by-laws means a certificate which would entitle the respondent to occupy the subject property.

We are unable to disagree with the reasoning of the learned Judge. In the absence of language which denotes the presence of a contrary intention, it may be presumed that the parties used the term 'Certificate of fitness' as employed the by-laws. Once this conclusion is reached, no fault may be
E placed upon the reasoning adopted by the learned judge. She merely construed the meaning according to well-settled canons of construction (see, for example Nourse LJ in *IDC Group Ltd v Clark* [1992] 2 EGLR 184). She did not commit any error. We are unanimous in our agreement with her judgment.

F We would therefore dismiss the appeal. The appellants must pay the cost of this appeal. The order of the judge is affirmed. The deposit in court is to be paid to the respondent to account of his taxed costs.

Appeal dismissed.

G Reported by Loo Lai Mee

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